

REMARKS

Favorable reconsideration of this application is respectfully requested in view of the claim amendments and following remarks.

Status of Claims

Claims 1-12, 14-27, 29 and 30 are currently pending in the application of which claims 1, 15, 29, and 30 are independent. Claims 1-12, 14-27, 29 and 30 were rejected. Claims 13 and 27 were previously canceled, and claims 3 and 17 have been canceled herein without prejudice or disclaimer of the subject matter contained therein.

By virtue of the amendments above, claims 1, 15, 29 and 30 have been amended.

No new matter has been introduced by way of the amendments above. Entry thereof is therefore respectfully requested.

Summary of the Office Action

Claims 1, 2, 15, 16, 29, and 30 were rejected under 35 U.S.C. § 102(e) as allegedly being anticipated by Gasca, Jr. et al. (U.S. Patent Application Publication Serial No. 20050198231), hereinafter "Gasca".

Claims 3-12, 14, 17-26, and 28 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Gasca, in view of Shabauddin (U.S. Patent No. 6877035), hereinafter "Shabauddin".

The aforementioned rejections are respectfully traversed for at least the reasons set forth below.

Claim Rejections Under 35 U.S.C. § 102

The test for determining if a reference anticipates a claim, for purposes of a rejection under 35 U.S.C. § 102, is whether the reference discloses all the elements of the claimed combination, or the mechanical equivalents thereof functioning in substantially the same way to produce substantially the same results. As noted by the Court of Appeals for the Federal Circuit in *Lindemann Maschinenfabrick GmbH v. American Hoist and Derrick Co.*, 221 USPQ 481, 485 (Fed. Cir. 1984), in evaluating the sufficiency of an anticipation rejection under 35 U.S.C. § 102, the Court stated:

Anticipation requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim.

Therefore, if the cited reference does not disclose each and every element of the claimed invention, then the cited reference fails to anticipate the claimed invention and, thus, the claimed invention is distinguishable over the cited reference.

- **Claims 1, 2, 15, 16, 29, and 30**

Claims 1, 2, 15, 16, 29, and 30 were rejected under 35 U.S.C. § 102(e) as allegedly being anticipated by Gasca. This rejection is respectfully traversed.

- **Independent claim 1**

As amended, independent claim 1, *inter alia*, “identifying an entitlement value and corresponding sliding window of the time period from the entitlement profile, wherein the entitlement profile associated with the application describes the burstiness of the application over the time period”.

Gasca does not teach the above-mentioned claim feature. Though Gasca discusses checking customer entitlement, Gasca discloses customer entitlement is a “matter of knowing what kind of resources are promised in the Service Level Agreement (SLA)”. *Gasca*, [0057]. In the claimed invention, however, the entitlement profile describes *the burstiness of the application over a time period* instead of what kinds of resources are promised in the SLA. Burstiness, as claimed and described in the specification on pages 5-6, is a measure of the application’s expected bursts for resources. Burstiness or a measure of the application’s expected bursts for resources is quite different than knowing what is promised in a SLA. Thus, identifying an entitlement value as claimed in independent claim 1 is quite different than checking customer entitlement in Gasca.

Moreover, the Office Action relies on Shahabuddin to teach this feature. Office Action, page 5. However, Shahabuddin fails to teach or suggest *the burstiness of the application over a time period*, i.e. an application’s expected bursts for resources. Instead, Shahabuddin discloses modeling *web access rates* over a 24 hour period. *Shahabuddin*, column 6, lines 9-27. Moreover, Shahabuddin notes that the resource requirement process is assumed to have *the same distribution each day*. *Shahabuddin*, column 6, lines 9-27.

At least for the foregoing reasons, Gasca fails to at least disclose the above-mentioned features, as claimed in independent claim 1.

Accordingly, Gasca fails to teach all the features of claim 1. The Examiner is thus respectfully requested to withdraw the rejection of independent claim 1 and the claims that depend therefrom and to allow all of these claims.

- *Independent claim 15*

Independent claim 15 recites, *inter alia*, “identify an entitlement value and corresponding sliding window of the time period from the entitlement profile, wherein the entitlement profile associated with the application describes burstiness of the application over the time period”. Thus, claim 15 recites certain features similar to those recited in claim 1 above. Therefore, claim 15 is believed to be allowable over the cited documents of record for at least the same reasons set forth above with respect to claim 1.

- Independent claim 29

Independent claim 29 recites, *inter alia*, “identify an entitlement value and corresponding sliding window of the time period from the entitlement profile, wherein the entitlement profile associated with the application describes burstiness of the application over the time period”. Thus, claim 29 recites certain features similar to those recited in claim 1 above. Therefore, claim 29 is believed to be allowable over the cited documents of record for at least the same reasons set forth above with respect to claim 1.

- Independent claim 30

Independent claim 30 recites, *inter alia*, “means for identifying an entitlement value and corresponding sliding window of the time period from the entitlement profile, wherein the entitlement profile associated with the application describes burstiness of the application over the time period”. Thus, claim 30 recites certain features similar to those recited in claim 1 above. Therefore, claim 30 is believed to be allowable over the cited documents of record for at least the same reasons set forth above with respect to claim 1.

- Dependent claims 2 and 16

Claims 2 and 16 are dependent from one of independent claims 1 and 15. Thus, it is also believed to be allowable over the cited documents of record for at least the same reasons as set forth to independent claims 1 and 15 above.

In view of the foregoing, it is therefore respectfully requested that the rejection of claims 2 and 16 be withdrawn, and these dependent claims be allowed.

Claim Rejections Under 35 U.S.C. § 103(a)

The test for determining if a claim is rendered obvious by one or more references for purposes of a rejection under 35 U.S.C. § 103 is set forth in *KSR International Co. v. Teleflex Inc.*, 550 U.S.398, 82 USPQ2d 1385 (2007):

“Under §103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.” Quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966).

As set forth in MPEP 2143.03, to ascertain the differences between the prior art and the claims at issue, “[a]ll claim limitations must be considered” because “all words in a claim must be considered in judging the patentability of that claim against the prior art.” *In re Wilson*, 424 F.2d 1382, 1385. According to the Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in view of *KSR International Co. v. Teleflex Inc.*, Federal Register, Vol. 72, No. 195, 57526, 57529 (October 10, 2007), once the *Graham* factual inquiries are resolved, there must be a determination of whether the claimed invention would

have been obvious to one of ordinary skill in the art based on any one of the following proper rationales:

(A) Combining prior art elements according to known methods to yield predictable results; (B) Simple substitution of one known element for another to obtain predictable results; (C) Use of known technique to improve similar devices (methods, or products) in the same way; (D) Applying a known technique to a known device (method, or product) ready for improvement to yield predictable results; (E) “Obvious to try”—choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success; (F) Known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations would have been predictable to one of ordinary skill in the art; (G) Some teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention. *KSR International Co. v. Teleflex Inc.*, 550 U.S.398, 82 USPQ2d 1385 (2007).

Furthermore, as set forth in *KSR International Co. v. Teleflex Inc.*, quoting from *In re Kahn*, 441 F.3d 977, 988 (CA Fed. 2006), “[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasonings with some rational underpinning to support the legal conclusion of obviousness.”

Therefore, if the above-identified criteria and rationales are not met, then the cited reference(s) fails to render obvious the claimed invention and, thus, the claimed invention is distinguishable over the cited reference(s).

• **Claims 3-12, 14, 17-26, and 28**

Claims 3-12, 14, 17-26, and 28 were rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Gasca in view of Shabauddin. The rejection as to canceled claims 3 and 17 has been rendered moot. The rejection as to the remaining claims is respectfully traversed.

o Dependent claims 4-12, 14, 18-26, and 28

Claims 4-12, 14, 18-26, and 28 are dependent from one of independent claims 1 and 15. Thus, it is also believed to be allowable over the cited documents of record for at least the same reasons as set forth to independent claims 1 and 15 above.

In view of the foregoing, it is therefore respectfully requested that the rejection of claims 4-12, 14, 18-26, and 28 be withdrawn, and these dependent claims be allowed.

Conclusion

In light of the foregoing, withdrawal of the rejections of record and allowance of this application are earnestly solicited. Should the Examiner believe that a telephone conference with the undersigned would assist in resolving any issues pertaining to the allowability of the above-identified application, please contact the undersigned at the telephone number listed below. Please grant any required extensions of time and charge any fees due in connection with this request to Deposit Account No. 08-2025.

Respectfully submitted,

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By /Ashok K. Mannava/

Ashok K. Mannava
Registration No. 45,301
(703) 652-3822

MANNAVA & KANG, P.C.
11240 Waples Mill Road
Suite 300
Fairfax, VA 22030
(703) 865-5150 (facsimile)